Supreme Court, U.S.
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No. 98-90

In The

Supreme Court of the United States

October Term, 1997

RICHARD BOLT, M.D., *et al.*,

Petitioners,

vs.

DAYTONA COMMUNITY HOSPITAL, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ALVIN SMITH, M.D. AND SHEDRICK ROBERSON, M.D.

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QUESTION PRESENTED FOR REVIEW

Respondents are dissatisfied with Petitioners' framing of the question presented for review insofar as it assumes its own conclusions and contains erroneous allegations in its predicate. Respondents would respectfully submit that the proper question presented for review is as follows:

> Whether the United States Court of Appeals for the Eleventh Circuit abused its discretion in affirming the United States District Court for the Middle District of Florida's denial of Petitioners' Motions for Relief from Judgment under Fed. R. Civ. P. 60(b)(4) & (6).

PARTIES TO THE PROCEEDING

Petitioners are Richard A. Bolt, M.D., and Richard A. Bolt, M.D., P.A.

Respondents are Richard Boye, M.D., Ralph Marino, M.D., Shedrick Roberson, M.D., Alvin Smith, M.D., Ormond Beach Memorial Hospital, and Daytona Community Hospital n/k/a Atlantic Medical Center-Daytona.

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STATEMENT OF THE CASE

Respondents are dissatisfied with Petitioners' presentation of the Statement of the Case and must therefore reject same. Similar to their *pro se* Briefs to the Eleventh Circuit Court of Appeals in this matter, Petitioners' Statement of the Case is replete with conclusory allegations, misrepresentations of fact, unsubstantiated accusations, misstatements of the law, improper argument and matters which are extraneous, irrelevant, immaterial and *dehors* the record. Instead of accurately describing the salient facts of the case, Petitioners employ overblown rhetoric and misuse buzzwords like "judicial activism" to grossly distort the record and unfairly besmirch the reputation of the trial judges, the Honorable Richard B. Kellam and the Honorable Robert Merhige, Jr.

For example, Petitioners misrepresent the course of proceedings of this case after the first trial was held in February of 1984 before Judge Kellam. At the first trial, directed verdicts were entered on all three of Petitioners' antitrust conspiracy theories. The Eleventh Circuit Court of Appeals affirmed three of the directed verdicts and reversed three of the directed verdicts. *Bolt v. Halifax Hosp. Medical Ctr.*, 851 F.2d 1273, 1289 (11th Cir. 1988). Contrary to Petitioners' erroneous allegations, the Eleventh Circuit *never* called the directed verdicts "unfortunate." (Pet. 2.) In actuality, the Eleventh Circuit deemed the district court's handling of the case to be unfortunate only to the extent that Judge Kellam ruled on the motions for directed verdict prior to Dr. Bolt presenting his case for restraint on competition. *Id.* at 1289-1290.

Petitioners continue their gross distortion of the record by erroneously asserting that Judge Merhige, who presided at the second trial of this case in August of 1994, encouraged or demanded Petitioners' attorneys to quit during the trial and that

he facilitated their "abrupt withdrawal" in the midst of trial. (Pet. 4-6.) Nothing could be further from the truth. To the contrary, the record demonstrates that Judge Merhige specifically **refused** to allow Petitioners' counsel to withdraw during the trial, and he explained as follows:

> All right. You are down to just a matter of economics. There has been a motion made by counsel for the plaintiff to withdraw from the case. If I permit them to do it, we will be here for three weeks, because he is talking about acting pro se. I am **not going to let them do it**, though. (emphasis added.)

(E.R. 106, P. 62.)[1]

In a similar vein, Petitioners now claim that their reasoned decision to voluntarily dismiss their claims with prejudice were "forced and involuntary." (Pet. 6.) To the contrary, Petitioners undeniably understood the settlement agreement and voluntarily entered into it for the rational purpose of avoiding an enormous cost judgment, as the following discussion clearly demonstrates:

> THE COURT: You understand now that, by that I presume that you mean you are willing to dismiss this with prejudice in exchange for them not seeking any costs.
>
> MR. LITCHFORD: Including Halifax Hospital.
>
> THE COURT: What do you mean including?

---

1. Citations to the exhibits to the record on appeal in the Eleventh Circuit are in the form of "E.R. __, P. __", which refer to the docket number of the exhibit to the record on appeal and the page number of that particular document.

MR. LITCHFORD: They have got a pending motion for costs, and they have got common representation.

MR. CHRISTOPHER: They are backing Dr. Smith.

THE COURT: If it is a deal at all, it is a deal they don't come after you for costs whatsoever.

MR. LITCHFORD: All defendants.

THE COURT: Any of the parties in this suit. Now, is that your understanding doctor?

DR. BOLT: Uh hum.

THE COURT: Is that what you want? Not what you want, is that what you are going to do?

DR. BOLT: Uh hum.

THE COURT: Uh hum means yes, I gather.

DR. BOLT: Yes, sir.

THE COURT: All right.

(R. 106, P. 69-70.)[2]

Petitioners also erroneously accuse Judge Merhige of "signaling Dr. Bolt that if he refused to accept a forced settlement, and attempted to continue, he was not going to be heard." (Pet. 6.) In support of this outrageous accusation, Petitioners quote a small portion of the record, completely taken out of context,

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2. Citations to the record on appeal in the Eleventh Circuit are in the form of "R. __, P. __", which refer to the docket number of the document in the record on appeal and the page number of that particular document.

and with obvious deletions signified by ". . ." *Id.* Significantly, Petitioners fail to mention that this portion of the record was made during a bench conference between Dr. Bolt, his attorneys and Judge Merhige, *outside* the presence of defense counsel. (E.R. 106, P. 57.)

Petitioners' mischaracterization of the record is obviously designed to create the inaccurate impression that Judge Merhige was prepared to have Petitioners' attorneys proceed with the trial, but not to make an argument. However, taken in context, it is clear that Judge Merhige's reference to "making an argument" referred to making a legal argument for a *withdrawal* and meant that he was going to spare Petitioners from the embarrassment of their attorneys making that argument in the presence of defense counsel. *Id.* Therefore, Petitioners' assertion that their attorneys were "purloined by the court" (Pet. 6) is another example of their overblown rhetoric and unsubstantiated accusations.

The course of proceedings below demonstrates that Petitioners have more than had their day in court. Dissatisfied with the results of their first trial in February of 1984, Petitioners began a protracted series of appeals. *See Bolt v. Halifax Hosp. Medical Ctr.*, 851 F.2d 1273 (11th Cir. 1988), *vacated*, 861 F.2d 1233 (11th Cir. 1988) (*en banc*), *remanded* to the original panel, 874 F.2d 755 (11th Cir. 1989) (*en banc*), 891 F.2d 810 (11th Cir. 1990), *cert. denied*, 110 S. Ct. 1960, 980 F.2d 1381 (11th Cir. 1993).

The case then went to a second trial on August 8, 1994 before the Honorable Robert Merhige, Jr., sitting by designation in the United States District Court for the Middle District of Florida, Case No. 82-122-CIV-ORL-18. On August 11, 1994, four days into that second trial, Petitioners, upon the advice of counsel, **voluntarily agreed** to the entry of an Order which

dismissed their claims **with prejudice** in exchange for Respondents' promise not to pursue any action for court costs or attorney's fees against Petitioners. (E.R. 95, 96 & 106.)

Notwithstanding the foregoing agreement, on September 9, 1994, Petitioners filed a Notice of Appeal in the Eleventh Circuit which asked for relief from said dismissal. (E.R. 98.) Upon Respondents' Motion to Dismiss, the Eleventh Circuit entered an Order on February 15, 1995 which dismissed Petitioners' appeal. (E.R. 100.) Subsequently, Petitioners filed Motions for Relief from Judgment under Fed. R. Civ. P. 60(b) on July 16, 1996 and on August 21, 1996. By Orders dated August 14, 1996 and October 21, 1996, respectively, Judge Merhige denied Petitioners' Rule 60(b) Motions. On November 18, 1996, Petitioners appealed Judge Merhige's denials of their Rule 60(b) Motions to the Eleventh Circuit, which affirmed Judge Merhige's rulings on October 27, 1997. Similarly, on May 12, 1998, the Eleventh Circuit denied Petitioners' Petition for Rehearing *En Banc*.

REASONS FOR DENYING THE WRIT

I.

THIS IS NOT AN APPROPRIATE CASE FOR EXERCISING THE COURT'S DISCRETIONARY JURISDICTION.

Denying the Petition for Writ of Certiorari would comport with this Court's standards of review under Rule 10, Rules of the Supreme Court of the United States. First, it is obvious that Rule 10(b) is inapplicable because it only pertains to state court decisions. It is also clear that Rule 10(c) is inapplicable because the Eleventh Circuit's decision did not decide "important question of federal law" at all, but rather merely affirmed the

district court's denial of Petitioners' Motions for Relief from Judgment. With further regard to Rule 10(c), it is incontrovertible that the Eleventh Circuit's decision does not conflict with any decision of this Court. Similarly, it is abundantly clear that the Eleventh Circuit's decision does not conflict with "the decision of another United States court of appeals on the same important matter." (Rule 10(a).)

Petitioners' attempt to cast this case as a "great departure from the accepted and usual course of proceedings", to invoke the exercise of this Court's supervisory power under Rule 10(a), is unavailing. Petitioners fail to recognize that the Eleventh Circuit did not "depart from the accepted and usual course of judicial proceedings" at all, nor has it "sanctioned such a departure by a lower court." To the contrary, the Eleventh Circuit simply ruled that the district court did not abuse its discretion in denying Petitioners' Motions for Relief from Judgment. The record in this case and the applicable law unequivocally demonstrate that the Eleventh Circuit had more than ample grounds for affirming the district court's rulings and that the course of proceedings in the district court did not even approach a "great departure from the accepted and usual course of proceedings."[3] *See* discussion *infra.* Thus, this Court should exercise its judicial discretion to deny the instant Petition.

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3. Although there is scant authority which delineates the scope of this Court's supervisory authority under Rule 10(a), it appears that the typical exercise of such supervisory authority is in the context of "ensuring that contempt proceedings are conducted in a manner consistent with basic notions of fairness." *Young v. U.S. Ex Rel Vuitton Et Fils S.A.*, 107 S. Ct. 2124, 2138 (1987).

II.

THE ELEVENTH CIRCUIT DID NOT ABUSE ITS DISCRETION IN AFFIRMING THE DISTRICT COURT'S DENIAL OF PETITIONERS' MOTIONS FOR RELIEF FROM JUDGMENT UNDER FED. R. CIV. P. 60(b)(4).

Although Petitioners attempt to couch their Petition in terms of "denial of due process" and "judicial activism", they utterly fail to demonstrate that the final judgment of involuntary dismissal is void or that extraordinary circumstances compel setting it aside. Based on the judicial system's substantial interest in preserving the finality of judgments, setting aside a judgment under Rule 60(b)(4) is narrowly restricted to void judgments, "in the rare instance of a clear usurpation of power." *Lubben v. Selective Service System Local Bd. No. 27*, 453 F.2d 645, 649 (1st Cir. 1972).[4]

The facts and circumstances of the August, 1994 trial before Judge Merhige demonstrate that the district court did **not** deny any fundamental due process to Petitioners. (E.R. 103-106.) Simply put, Petitioners agree to "throw in the towel" in exchange for Respondents' agreement not to seek any costs or attorney's fees from them. (E.R. 106, P. 67-71.) Despite Petitioners' unsubstantiated accusations and distortions of the record, they have **never** adduced any evidence whatsoever that Judge Merhige acted improperly, much less that he committed a clear

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4. *Accord Margoles v. Johns*, 660 F.2d 291, 295 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1256 (1982) (to show that a judgment is void, the plaintiff must show not simple error, but that a fundamental due process was in fact denied to him); *Marshall v. Board of Education*, 575 F.2d 417, 422 (3rd Cir. 1978) (a judgment is not void merely because it is erroneous); *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220 (10th Cir. 1979); *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661 (1st Cir. 1990).

usurpation of judicial power which actually denied due process. Furthermore, Petitioners have not set forth any actual facts, as opposed to conjecture and opinion, which show either that the district court abused its discretion in denying their Motions for Relief from Judgment or that the Eleventh Circuit abused its discretion in affirming the district court's rulings.[5]

Again, despite the absence of any factual basis whatsoever, Petitioners now claim that they were compelled to "accept a forced and involuntary settlement." (Pet. 6.) To the contrary, Dr. Bolt clearly made a reasoned decision, without any indicia of compulsion or coercion, to voluntarily dismiss his claims with prejudice. In chambers, Judge Merhige, as well as counsel for Petitioners, questioned Dr. Bolt about proceeding with the case. After some discussion, Dr. Bolt stated "I guess we are over. Thank you very much. I guess we are all through. We will throw in the towel." (R. 106, P. 69.)

A careful examination of the trial transcript for August 11, 1994 reveals that, far from coercing an unwanted settlement, Judge Merhige protected Petitioners from an enormous cost judgment (including possibly attorney's fees), and he sought to expedite the resolution of what had been more than twelve years of litigation. (E.R. 106.) This, of course, does not even come close to a denial of due process. The fact that Petitioners actually were heard at trial, prior to the entry of the final judgment, confirms the voluntariness of the settlement and

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5. Petitioners include a laborious and irrelevant diatribe about peer review and alleged conduct on the part of the hospitals and physicians whom Petitioners have enmeshed in this litigation for sixteen years. (Pet. 8-16.) Respondents vehemently object to Petitioners' outrageous and unsubstantiated accusations that Dr. Smith solicited perjury (Pet. 14-15.) and that the hospitals committed "even criminal conduct." (Pet. 14.) These accusations are wholly improper insofar as the record in this case is completely devoid of any finding or admission of perjury or criminal conduct.

militates very strongly against a finding that the judgment is void.

Petitioners' assertion that Judge Merhige was "irrevocably prejudiced towards Dr. Bolt" is unavailing. (Pet. 7.) Once again, Petitioners present no actual facts in support of their accusation; they merely provide a hodgepodge of baseless conjecture and isolated comments taken out of context. Petitioners utterly fail to demonstrate that Judge Merhige was so biased or so prejudiced that the trial was fundamentally unfair. *See, e.g., Margoles*, 660 F.2d at 295.[6] As in *Margoles*, the instant Petition is really a manifestation of Petitioners' inability to let go of this litigation, rather than the product of any substantive merit. Hence, as in *Margoles*, the Eleventh Circuit properly affirmed the district court's denial of relief under Rule 60(b)(4).

III.

THE ELEVENTH CIRCUIT DID NOT ABUSE ITS DISCRETION IN AFFIRMING THE DISTRICT COURT'S DENIAL OF PETITIONERS' MOTIONS FOR RELIEF FROM JUDGMENT UNDER FED. R. CIV. P. 60(b)(6).

It is clear that the Eleventh Circuit did not abuse its discretion in affirming the district court's denial of Petitioners' Motions for Relief from Judgment under Fed. R. Civ. P. 60(b)(6). The reason is that Petitioners utterly fail to satisfy this Court's long standing requirement for relief under Rule 60(b)(6); that is, adducing evidence of "extraordinary circumstances." *See, e.g., Ackermann v. United States*, 71 S.

6. The Seventh Circuit's reasoning in *Margoles* is fully applicable herein: "[E]ven personal and direct involvement in proceedings creating the grounds for animosity toward a party . . . is not a sufficient showing of deprivation of constitutionally guaranteed fairness." 660 F.2d at 297.

Ct. 209 (1950). *See also Griffin v. Swim-Tech Corp.*, 722 F.2d 677 (11th Cir. 1984); *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111 (11th Cir. 1993). Uncontroverted authority holds that a "party seeking relief [under Rule 60(b)(6)] has the burden of showing that absent such relief, an 'extreme' and 'unexpected' hardship will result." (citations omitted) *Griffin*, 722 F.2d at 680.

Simply put, Petitioners cannot demonstrate that the judgment of voluntary dismissal with prejudice at the second trial has caused them to sustain any extreme and unexpected hardship. The fact that the voluntary dismissal relieved Petitioners from the burden of paying Respondents' costs is not a hardship at all. In reality, Petitioners are merely experiencing a form of "buyer's remorse."[7] However, this Court has long held that relief under Rule 60(b)(6) is not available where, as here, a party has made a deliberate litigation decision which later inures to his detriment; this even applies where hindsight may indicate that he made a mistake. *Ackermann*, 71 S. Ct. at 211-212. Because Petitioners' decision to accept the voluntary dismissal of their case in exchange for Respondents' agreement not to pursue a cost judgment against them does not constitute the extraordinary circumstance of an extreme and unexpected hardship, the Eleventh Circuit properly affirmed the district court's denial of Petitioners' Motions for Relief from Judgment.[8]

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7. The authorities are legion that buyer's remorse does not allow one to invoke relief under Rule 60(b)(6). *See, e.g., Sheng v. Starkey Laboratories, Inc.*, 117 F.3d 1081 (8th Cir. 1997); *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572 (10th Cir. 1996); *Andrulonis v. United States*, 26 F.3d 1224 (2nd Cir. 1994).

8. Petitioners' attempt to invoke the authority of *Klapprott v. United States*, 69 S. Ct. 384 (1949), is purely specious. The petitioner in *Klapprott* had a default judgment entered against him in denaturalization proceedings while he was severely ill, penniless and after four years of incarceration in another state. 69 S. Ct. at 385-389. In complete contrast to the indigent

(Cont'd)

CONCLUSION

Based on the foregoing facts, circumstances and authorities, the instant Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(Cont'd)
petitioner in *Klapprott*, Dr. Bolt was never incarcerated, never deprived of the opportunity to participate in court proceedings (two trials were held during twelve years of litigation), and experienced trial counsel represented Dr. Bolt.